Supreme Court, U.S.
FILED
JUN 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-1373 and 86-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, *et al.*,

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

O. PETER SHERWOOD
Solicitor General
(Counsel of Record)
PETER H. SCHIFF
Deputy Solicitor General
DAVID R. WOOLEY
MICHAEL J. MOORE
Assistant Attorneys General
New York State Department of Law
The Capitol
Albany, New York 12224
(518) 474-4819

Attorneys for Petitioners State of New York, et al.

(Counsel continued on inside cover)

BRUCE J. TERRIS
(Counsel of Record)
JAMES M. HECKER
TERRIS, EDGECOMBE, HECKER & WAYNE
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

RODERICK M. MCLEOD, Q.C.
Deputy Minister
Ministry of the Environment
135 St. Clair Avenue West
Toronto, Ontario M4V 1P5
(416) 323-4272

Attorneys for Petitioners Her Majesty the Queen in Right of Ontario, et al.

ROBERT ABRAMS
Attorney General of New York

JAMES E. TIERNEY
Attorney General of Maine

JAMES M. SHANNON
Attorney General of Massachusetts

JEFFREY L. AMESTOY
Attorney General of Vermont

W. CARY EDWARDS
Attorney General of New Jersey

JAMES E. O'NEIL
Attorney General of Rhode Island

JOSEPH I. LIEBERMAN
Attorney General of Connecticut

STEPHEN E. MERRILL
Attorney General of New Hampshire

HOWARD FOX
Attorney for private party petitioners Sierra Club, et al.

Nos. 86-1373 and 86-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, *et al.*,

Petitioners,

v.

LEE M. THOMAS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

1. In its opposition, the federal respondent (hereafter referred to as "EPA") virtually ignores the unusual disposition of petitioners' claim by the court of appeals' decision in this case. Petitioners brought a citizen suit under Section 304 of the Clean Air Act contending that the former Administrator of the U.S. Environmental Protection Agency (EPA), Douglas Costle, made two findings which triggered a mandatory duty under Section 115 of that Act to take further regulatory action to abate international air pollution. The court of appeals held that that asserted duty was unenforceable solely because of the absence of notice and comment on those findings under the Administrative Procedure Act. Pet. No. 86-1373, App. A, pp. A-7 to A-8. It expressly

refused to decide whether, assuming the Costle findings were procedurally correct, they gave rise to a mandatory duty on EPA under Section 115. *Ibid.*

Nevertheless, EPA defines the question presented as whether the Costle findings "gave rise to a legally binding and nondiscretionary duty on the part of the current Administrator to take regulatory action under Section 115 * * *," regardless of whether they were preceded by notice and comment. Fed. Opp., Question Presented. While that is a fair statement of the ultimate issue in this case, it avoids the threshold procedural question under the APA that the court of appeals found to be dispositive.[1]

Most of the arguments raised by EPA are simply irrelevant to both this threshold issue and the ultimate issue concerning Section 115 of the Clean Air Act. For example, it is irrelevant whether acid rain is the subject of bilateral discussions between United States and Canada (Fed. Opp. 5-7, 14, 22), whether EPA is also researching acid rain under the Acid Precipitation Act of 1980[2] (*id.* at 4-5, 22), and whether former Administrator Costle's successors decided it was "unwise" to use Section 115 to control acid rain because of its "complexities and uncertainties" (*id.* at 15, 22). In addition, although arguments whether Congress intended Section 115 to apply to a multi-source problem such as

---

1. The industry respondents argue that despite Congress' choice of the word "belief" to describe the type of threshold finding of endangerment necessary under the statute, such beliefs can not create future legal obligations unless they are formalized through rulemaking procedures. Ind. Opp. 13-15. Otherwise, they argue, even a stray remark by the Administrator in the hallway outside his office could trigger a duty to undertake regulatory action. *Id.* at 14. However, the word "belief," in the context used by Congress here, obviously requires both an objective manifestation of assent and the intent to convey it. We demonstrated in our petitions (No. 86-1373, pp. 5-6; No. 86-1374, pp. 7-8) that Costle's findings in the present case satisfy both requirements. Indeed, Costle expressly stated that his findings were "adequate to warrant the initiation of a Section 115 based plan revision process in appropriate States" (Pet. No. 86-1373, App. B, p. A-41). In any event, this argument, like those of EPA, was not reached by the court below and is not relevant to the threshold issue before this Court. It provides no basis for the denial of a writ of certiorari.

2. This Act is merely a research funding bill which specifically states that it is not intended to restrict, modify, or expand the scope of existing law. 42 U.S.C. 8904(b).

acid rain (*id.* at 4, 19-20), or whether a mandatory duty arises under Section 115 only after EPA identifies and notifies the offending states (*id.* at 9-10, 14-16) relate to the ultimate issue of whether a mandatory duty exists under Section 115, they are irrelevant to the court of appeals' decision that notice and comment are required on the Costle findings.

2. After these irrelevant arguments are excised from EPA's opposition, its remaining arguments reveal a fundamental unwillingness to accept the full consequences of the court of appeals' decision. Thus, EPA states (Fed. Opp. 21):

> [T]his case does not present the question of whether the threshold findings that trigger the obligation to conduct a rulemaking under various other environmental statutes are themselves rules that must be promulgated in accordance with notice and comment requirements.

Instead, EPA contends that these rulemaking procedures only apply to the attempted use of Section 115 of the Clean Air Act "to rectify the problem of acid deposition." *Ibid.*[3]

EPA presents no legal basis for such a distinction, and there is none. The application of APA rulemaking procedures obviously does not depend on the particular type of pollution addressed by a threshold finding. A rule under the APA is defined in terms of the applicability and effect of agency findings, not their subject matter. 5 U.S.C. 551(4).

EPA's argument is therefore nothing less than a strained attempt to justify the application of a legal principle in the present case and deny its applicability to all similar cases in the future. We submit that EPA has taken this approach because it simply cannot accept the full consequences of the court of appeals' decision. As Ontario has explained in its petition (No. 86-1374, pp. 14-15), that decision would mean that EPA would

3. By seeking to distinguish threshold findings under Section 115 of the Clean Air Act with similar such findings "under various other environmental statutes" (Fed. Opp. 21), EPA assumes that the court of appeals' decision applies only to threshold findings under one section of the Clean Air Act. However, as New York has demonstrated in its petition (No. 86-1373, pp. 20-21), similar threshold findings are contained in many other sections of the Clean Air Act itself.

have to conduct rulemakings to issue threshold findings under numerous other provisions of the Clean Air Act and many of the other environmental statutes it administers. By simply stating as an *ipse dixit* that the decision below does not apply to other indistinguishable statutory provisions, EPA implicitly recognizes that such a legal principle would seriously interfere with its regulatory efforts by multiplying the number of rulemaking proceedings necessary to issue a final rule.

3. Neither EPA nor industry have persuasively explained the linchpin of the court of appeals' decision, *i.e.*, that agency findings are rules under the APA if their only effect is to trigger a statutory duty to take further regulatory action specified by Congress. As we have shown in our petitions (No. 86-1373, pp. 15-17; No. 86-1374, pp. 15-16), this reasoning is clearly erroneous. The Costle findings are not rules because they are not applicable to anyone and do not impose any duties on anyone. No state or polluter need take any action based on those findings.

Once those findings are made, Congress has directed in Section 115 that certain further action by EPA must occur. However, this binding effect of the findings is solely one of Congressional origin. It therefore makes no sense for such a Congressionally-created "rule" to be preceded by notice and comment.

EPA does not deny that former Administrator Costle made the two findings of endangerment and reciprocity specified in Section 115. Furthermore, neither EPA nor the industry respondents makes any effort to explain the need for notice and comment prior to the issuance of the Costle findings. As we have shown in our petitions (No. 86-1373, pp. 4-5, 20; No. 86-1374, pp. 6-9), even without such an opportunity, the public would have at least two other opportunities for notice and comment before any emission control requirements could be imposed on anyone to control acid rain. Neither EPA nor industry deny that this is correct. Furthermore, neither EPA nor industry identify any way in which they or the public are prejudiced if a third opportunity for notice and comment is omitted. There is therefore no reason for further

notice and comment before EPA takes the next step which Congress has directed.

For the foregoing reasons and the reasons stated in the petitions, we respectfully submit that the petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit should be granted.

ROBERT ABRAMS
Attorney General of the State of New York

O. PETER SHERWOOD
Solicitor General
(Counsel of Record in No. 86-1373)
PETER H. SCHIFF
Deputy Solicitor General
DAVID R. WOOLEY
MICHAEL J. MOORE
Assistant Attorneys General
New York State Department of Law
The Capitol
Albany, New York 12224
(518) 474-4819

JAMES M. SHANNON
Attorney General of the Commonwealth of Massachusetts

JANET MCCABE
LEE BRECKENRIDGE
Assistant Attorneys General
Commonwealth of Massachusetts
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108
(617) 727-2265

JAMES E. TIERNEY
Attorney General of the State of Maine

GREGORY W. SAMPLE
Assistant Attorney General
State of Maine
Office of the Attorney General
State House, Station 6
Augusta, Maine 04333
(207) 289-3661

BRUCE J. TERRIS
(Counsel of Record in No. 86-1374)
JAMES M. HECKER
TERRIS, EDGECOMBE, HECKER & WAYNE
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

RODERICK M. MCLEOD, Q.C.
Deputy Minister
Ministry of the Environment
Government of the Province of Ontario
135 St Clair Avenue West
Toronto, Ontario M4V 1P5

Attorneys for Petitioners Her Majesty the Queen in Right of Ontario, et al.

JEFFREY L. AMESTOY
Attorney General of the State of Vermont

J. WALLACE MALLEY, JR.
Assistant Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

JAMES E. O'NEIL
Attorney General of the State of Rhode Island

GARY POWERS
Special Assistant Attorney General
State of Rhode Island
Office of the Attorney Genera.
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

JOSEPH I. LIEBERMAN
Attorney General of the State of Connecticut

ROBERT WALSH
Assistant Attorney General
State of Connecticut
State Office Building, Rm. 147
Hartford, Connecticut 06106
(203) 566-7213

STEPHEN MERRILL
Attorney General of the State of New Hampshire

DANA BISBEE
Assistant Attorney General
Environmental Protection Division
State of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679

W. CARY EDWARDS
Attorney General of the State of New Jersey

PAUL SCHNEIDER
Deputy Attorney General
Office of the Attorney General
Richard J. Hughes Justice Complex (CN-112)
Trenton, New Jersey 08625
(609) 984-5612

HOWARD FOX
Attorney for Petitioners
Sierra Club
Natural Resources Defense Council
National Audubon Society
National Wildlife Federation
Honorable Richard Ottinger
Robert & Janet Townsend
Ellen Edith Desmond
Sierra Club Legal Defense Fund
1516 P Street, N.W., Suite 300
Washington, D.C. 20005
(202) 667-4500

June 1987